

No. 16019 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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J. BRUCE ADAMSON, *et al.*,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, *et al.*,

*Appellees.*

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## BRIEF FOR APPELLEES.

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**FILED**

SEP 12 1958

PAUL P. O'BRIEN, CLERK



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## BRIEF FOR APPELLEES.

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### Jurisdiction.

Appellants brought action in the Court below seeking damages under the Federal Tort Claims Act [Title 28, United States Code, Secs. 1346(b), 2671-2680—R. 2-7, 15-21].<sup>1</sup> The District Court ordered appellants' action "dismissed for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted" [R. 50]. It is the position of appellees that the Court below did not have jurisdiction over the subject matter of appellants' action.

Since the order of the District Court dismissing appellants' action [R. 49-50] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant

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<sup>1</sup>"R" indicates references to the typewritten Transcript of Record.

to Title 28, United States Code, Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter [*United States v. Corrick*, 298 U. S. 435, 440 (1936)].

### Statement of the Case.

Appellants filed in the District Court a Complaint [R. 2-7], and thereafter an Amended Complaint [R. 15-21], seeking damages under the Federal Tort Claims Act. The Complaints alleged, *inter alia*, that the United States owned certain lands [R. 2, 3, 16]; that one Curtis H. Springer advertised these lands through the United States mails [R. 4]; that said Springer sold to appellants a parcel of these lands for \$850.00 with representations through the mails that their money would be refunded if they were unsatisfied [R. 4, 18]; and that appellants thereafter demanded the return of their money, which was refused [R. 5, 18].

Appellees moved to dismiss appellants' action and each of their Complaints upon the grounds, among others, that the Court lacked jurisdiction over the subject matter and that the Complaints failed to state a claim upon which relief could be granted [R. 8-9, 22-23].

After a hearing upon appellee's motions [R. 30], the Court below determined that it lacked jurisdiction over the subject matter of appellants' action "since claims arising out of misrepresentation or deceit are by statute specifically exempted from the coverage of the Tort Claims Act, and that the Complaints on file herein fail to state a claim upon



which relief can be granted under the Tort Claims Act or otherwise" [R. 49-50]. The District Court ordered appellants' action and each of their Complaints dismissed [R. 50].

### Issues Presented.

1. Did the District Court have jurisdiction over the subject matter of appellants' action under the Federal Tort Claims Act?
2. Did appellants' Complaints, or either of them, state a claim upon which relief can be granted, under the Federal Tort Claims Act?

### Statutes Involved.

Title 28, United States Code, Section 1346(b) [Section 1346(b) of the Act of June 25, 1948, 62 Stat. 933, as amended by Section 2(a) of the Act of April 25, 1949] provides:

"§1346. United States as defendant

\* \* \*

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

Title 28, United States Code, Section 2680 [Section 2680 of the Act of June 25, 1948, 62 Stat. 984-985] provides in pertinent part:

“§2680. Exceptions

“The provisions of this chapter and Section 1346(b) of this title shall not apply to—

“(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”

## ARGUMENT.

### I.

**The District Court Did Not Have Jurisdiction Over the Subject Matter of Appellants' Action Under the Federal Tort Claims Act.**

Appellants allege that they were induced by the advertisements of one Curtis H. Springer to pay \$850.00 for a parcel of land, with representations that their money would be refunded if they were not satisfied [R. 4, 18]; and that they thereafter demanded the return of their money which was refused [R. 5, 18]. The original Complaint also avers that appellants secured judgments against Springer for \$850.00 plus interest, but implies that these judgments are not collectible [R. 5]. Appellants seek vaguely to attribute their loss to the United States.

It is manifest, however, that appellants' claim, if any, arose out of misrepresentation or deceit and such claims

were specifically excepted by statute from the coverage of the Federal Tort Claims Act.

Title 28, United States Code, Sec. 2680(h);

*Miller Harness Co. v. United States*, 241 F. 2d 781, 783 (2d Cir. 1957);

*Clark v. United States*, 218 F. 2d 446, 452 (9th Cir. 1954);

*National Mfg. Co. v. United States*, 210 F. 2d 263, 275-276 (8th Cir. 1954), *cert. den.* 347 U. S. 967;

*Jones v. United States*, 207 F. 2d 563 (2d Cir. 1953), *cert. den.* 347 U. S. 921;

*Anglo-American and Overseas Corp. v. United States*, 144 Fed. Supp. 635, 637-638 (S. D. N. Y. 1956), affirmed 242 F. 2d 236;

*Social Security Admin. Baltimore F. C. U. v. United States*, 138 Fed. Supp. 639, 650-651 (D. C. Md., 1956).

But compare:

*Panella v. United States*, 216 F. 2d 622 (2d Cir., 1954).

Nor may appellants evade this exception by contending that the United States negligently allowed the representations to be made. As this Court pointed out in *Clark v. United States*, *supra* (p. 452):

“\* \* \* 28 U. S. C. A. §2680(h) exempts from the coverage of the Tort Claims Act any claim arising out of misrepresentation. *Misrepresentation as used in this section has been held to include negligent as well as intentional misrepresentation.* \* \* \*”

Moreover, the Federal Tort Claims Act only covers injury or loss of property caused by the negligent or wrongful act or omission of *an employee of the Government while acting within the scope of his office or employment*. [28 U. S. C., Sec. 1346(b); *Pacific Freight Lines v. United States*, 239 F. 2d 191 (9th Cir., 1956); *Gardner v. United States*, 238 F. 2d 263 (Dist. Col. Cir., 1956); *Sickman v. United States*, 184 F. 2d 616 (7th Cir., 1950), *cert. den.* 340 U. S. 950.] And it has been held that “a complaint filed pursuant to the Federal Tort Claims Act must specify a definite act of commission or omission on the part of some particular employee or employees of the government.” [*Schetter v. Housing Authority of the City of Erie*, 132 Fed. Supp. 149, 152 (W. D. Pa., 1955).]

While in the case at bar the original Complaint intimates that one Curtis H. Springer was “manager” of government lands [R. 4], neither of the Complaints alleges that Springer was an employee of the Government *acting within the scope of his employment*. Indeed, both the original Complaint [Par. VIII—R. 5] and the Amended Complaint [Pars. IV, IX—R. 17, 18-21] would seem to establish that Springer was performing no governmental activity. The Complaints fail to specify a definite act of commission or omission on the part of any other employee or employees of the Government.

## II.

### Neither of Appellants' Complaints States a Claim Upon Which Relief Can Be Granted Under the Federal Tort Claims Act.

#### A. The Complaints Fail to State a Claim Against Defendants Other Than the United States.

In addition to the United States, the original Complaint named as defendant "His Excellency Dwight David Eisenhower, Chief Executive," while the Amended Complaint named as defendants "Laughlin E. Waters, U. S. Attorney, Joe Doe and Jenie Roe, Postmasters of the Town of Baker, California, and John Doe Whitmer."<sup>2</sup>

Suits under the Tort Claims Act should be brought against the United States exclusively [*Schetter v. Housing Authority of the City of Erie*, 132 Fed. Supp. 149, 153 (W. D. Pa., 1955); *Wickman v. Inland Waterways Corporation*, 78 Fed. Supp. 284 (D. C. Minn., 1948); cf., 28

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<sup>2</sup>The Amended Complaint, in adding new parties without order of court violated Rule 21, Federal Rules of Civil Procedure [*Mitchell v. Carborundum Co.*, 7 F. R. D. 523 (W. D. N. Y. 1947)]. In joining fictitious parties, it also violated a local rule of the District Court [see, Order Re: Joinder of Fictitious Parties, following Rule 37, Rules of the United States District Court for the Southern District of California] which provides:

#### "ORDER RE: JOINDER OF FICTITIOUS PARTIES

"Effective on and after March 1, 1957, unless otherwise ordered by the Court in a particular case, the Clerk shall refuse to accept for filing, in any civil action or proceeding originally commenced in this Court, any complaint wherein any party is designated and sought to be joined under a name which is alleged to be, or for other reasons unquestionably is, wholly fictitious, unless the complaint be accompanied by a dismissal as to every party designated by a fictitious name. [See *Molnar v. National Broadcasting Co.*, 231 F. 2d 684, 687 (9th Cir. 1956).]"

The Court below nevertheless allowed the Amended Complaint to be filed [R. 30].

U. S. C., Sec. 2679]. Moreover, public officials are immune from personal liability for actions within the scope of their official powers [*Spalding v. Vilas*, 161 U. S. 468 (1896); *Gregoire v. Biddle*, 177 F. 2d 579 (2d Cir., 1949)].

**B. The Complaints Fail to State a Claim Against the United States.**

Appellants' Amended Complaint [R. 15-21] apparently proceeds upon the premise that the United States is liable because it failed to prevent them from being deceived. This premise is thinly veiled under the averment that appellees "negligently, wrongfully, and in omission of their duties suffered one Curtis A. Springer, and his *alter egos*, to establish, create and maintain an attractive nuisance, and a public nuisance on the said lands of the United States" [R. 17]. It may be inferred, although it is not explicitly alleged, that the neglect complained of consisted of permitting certain advertisements and other matter to pass through the United States mails [R. 18-21].

In an action under the Federal Tort Claims Act the Complaint must allege facts showing that the defendant breached a legally imposed duty owing to the plaintiff [*Wooldridge Manufacturing Company v. United States*, 235 F. 2d 513 (Dist. Col. Cir., 1953), *cert. den.* 351 U. S. 989]. The United States owed appellants as individuals no legal duty to protect them from deceit. While the Government in its sovereign capacity seeks to protect the public from fraud and other deceptions [see for example Sec. 1341 of Crim. Code, 62 Stat. 763, 18 U. S. C., Sec. 1341, which prohibits use of the mails to defraud, the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. A., Secs. 301 *et seq.*; the Federal Trade Com. Act, 38 Stat. 717, 15 U. S. C. A., Secs. 41 *et seq.*]; it incurs no

tort liability to the victim of any such fraud or deception [*Anglo-American and Overseas Corp. v. United States*, 144 Fed. Supp. 635, 637-638 (S. D. N. Y. 1956), affirmed 242 F. 2d 236; *Social Security Admin. Baltimore F. C. U. v. United States*, 138 Fed. Supp. 639, 650-651 (D. C. Md., 1956)].

The imposition of liability against the Government for its failure to protect the individual "against the need to exercise his own judgment" [see, *National Mfg. Co. v. United States*, 210 F. 2d 263, 280 (8th Cir., 1954), *cert. den.* 347 U. S. 967] has no analogous private liability [*cf.*, *Dalehite v. United States*, 346 U. S. 15, 43-44 (1953); *Feres v. United States*, 340 U. S. 135, 142 (1950)]. As the Supreme Court pointed out in *Dalehite*, where a suit under the Tort Claims Act had been instituted to recover damages for a death resulting from the disastrous explosion at Texas City, Texas (p. 43):

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

". . . the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. *Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.*" *Feres v. United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. \* \* \*" [Emphasis supplied.]

**Conclusion.**

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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